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U.S. Department of Homeland Security
20 Mass, Rm. A3042, 425 I Street, N.W.
Washington, DC 20536

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: FEB 10 2004

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The case will be dismissed.

The petitioner is a real estate holding and leasing corporation. It seeks to employ the beneficiary permanently in the United States as a building superintendent. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, that was filed on November 26, 1996 and approved by the Department of Labor March 29, 2001. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate eligibility beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. The petitioner must, therefore, demonstrate the continuing ability to pay the proffered wage beginning on the priority date. Here, the Form ETA 750 was accepted on November 26, 1996. The proffered wage as stated on the Form ETA 750 is $63,700 per year.

With the petition, filed on or about March 11, 2002, the petitioner submitted only an experience letter for the beneficiary relating to his employment by the petitioner as a building superintendent. Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the Vermont Service Center, on May 22, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested the petitioner's 2001 federal income tax returns with schedules and attachments. The Service Center also requested any Tax and Wage Statements related to the beneficiary's employment by the petitioner for 2000 and 2001.

In response, on August 19, 2002, the petitioner submitted the 2001 U.S. Individual Income Tax Return (Form 1040) for the beneficiary. Also submitted were various W-2 Wage and Tax Statements for tax years 2000 and 2001. These W-2 statements, which list the beneficiary as the employee, were from 10 different employers as demonstrated by the tax identification numbers reflected in the W-2s. The petitioner also submitted a letter dated August 7, 2002 signed by [redacted] CPA, identified as the Controller of Brusco Contracting Corp., and affiliated companies. The letter notes that the company has been in business since 1954 and had a net income in excess of $250,000 in 2001. The director determined that the evidence submitted did not establish

that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and on October 25, 2002, denied the petition. The director concluded that the information submitted showed that the beneficiary's personal income tax return reflected wages of $40,750, an amount significantly below the $63,700 proffered wage. The director recognized that several W-2s were submitted, but noted that the combined amount of the wages reflected on the W-2s was the same amount reflected on the beneficiary's personal tax return. In addition, the decision noted that while the Service recognized that Brusco Contracting has affiliated companies, the Service was unable to verify that Brusco Contracting owns all the companies that the beneficiary worked for during 2001.

On appeal, the petitioner submits a letter from Paul Brusco indicating that he is enclosing a copy of the 2001 tax return for West River Associates (WRA).[1] The Brusco letter asserts that, "The owner of WRA is affiliated with Brusco Contracting Corp." The attached tax return is a Form 1065 U.S. Return of Partnership Income for West River Associates, identified as a real estate entity involved in the rental business and organized as a domestic general partnership. The tax return identifies the tax identification number for the partnership as 13-3713377. This number is not reflected on any of the W-2 statements that were submitted. Although the Service Center identified the deficiencies in the petitioner's submission and provided clear direction as to documents that would assist it in determining the ability to pay, the petitioner failed to submit those documents and offered no explanation for the failure. On appeal the petitioner now seeks to introduce an entirely new entity, West River Associates, and simply asserts in a brief letter that yet another entity, as yet unidentified, is the owner of WRA and is an affiliate of Brusco contracting. While the petitioner continues to partially expose a complex network of business relationships, no effort has been made to illuminate the necessary nexus between those entities and the petitioner and to the employment of the beneficiary. In order to determine the petitioner's ability to pay it is critical to understand the relationship of the entities, and also the financial status of those entities. The petitioner has provided insufficient information as to both. The failure to submit such information and the failure to respond directly to the Service Center's requests casts doubt upon the petitioner's assertions to date, the nature of the employment relationship with the beneficiary, and even the identity of the true employer.

In addition to the petitioner's failure to directly respond to the Service Center's request for something as obvious as Brusco Corporation's tax return, there exist other troubling indicators that things are not as clear as the petitioner represents them to be. For example, we note that the ETA 750 contains numerous changes/corrections. While changes/corrections to the ETA750 are not uncommon, and are routinely approved by the Department of Labor, such changes are always endorsed by the DOL. However, the ETA 750 contains a change to Item 4, which identifies the name of the employer. The employer is identified as Brusco Contracting/Associates and Aff'd Companies, but it is clear that this is a modification of a previous entry on the form. Nevertheless, there is no endorsement of the changes by the Department of Labor as exist with at least twelve other separate changes to the ETA 750. This casts doubt as to the true identify of the petitioner/employer. Furthermore, there is information from the beneficiary's tax return itself that casts doubt upon the nature of the employment relationship. As noted previously, the director determined that aside from the petitioner's identity, it was clear that the wages reflected in all of the W-2s was well below the proffered

[1] The petitioner is considered to be self-represented on appeal due to the absence of a Notice of Entry of Appearance as an Attorney or Representative (Form G-28). It is noted, however, that it appears from the Notice of Appeal (Form I-290B), that an individual identified as an attorney or representative, but whose signature is illegible, has submitted the appeal. (It appears that the individual executing the signature may have mixed up the information as to the representative on appeal and the entity being represented.) Consequently, while we are treating the petitioner as self-represented, it appears that someone with a legal background has assisted in submitting information on behalf of petitioner related to the appeal.

wage. When the beneficiary's individual tax return is examined, it appears that $5,500 of the total amount of the beneficiary's 2001 income was attributable to his own business, as noted in the Schedule C-EZ (Net Profit from Business) to the Form 1040. This information casts further doubt on the employment arrangement and suggests that the beneficiary holds himself out to be a sole proprietor/independent contractor at least for a portion of his income. It appears doubtful that the beneficiary has a full-time employment arrangement with the petitioner.

Although the petitioner is in the best position to determine what documents are available to establish the relationships, at a minimum the petitioner should have submitted documents related to the financial situation of WRA and any additional documents demonstrating the business relationship that exists between WRA and any entities whose revenue upon which WRA relies to make up its revenue. Upon examining the Form 1065 and related documents it appears that the rental revenue is made up of rents from three properties. However, none of the properties identified have any obvious relationship to the employers identified on the W-2 forms, therefore sufficient evidence should be provided to establish such relationship. Furthermore, the record reflects that the petitioner has only submitted financial information related to 2001. Because the petitioner must demonstrate the ability to pay from the priority date up through the point of the approval of the petition, any information submitted must address the full period.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.